

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6700

Case No. S-2489

PETITION OF MARK W. AND KAY COLVIN

OPINION OF THE BOARD

Hearing held January 9, 2002

Effective date of Opinion: February 28, 2002

Case No. S-2489 is a petition for a special exception to permit an accessory apartment pursuant to Section 59-G-2.00 of the Zoning Ordinance of Montgomery County, Maryland. *Montgomery County Code, 1994, as amended.* (the Zoning Ordinance)

A hearing was held pursuant to Section 59-A-4.11(a) of the Zoning Ordinance, at which time Petitioners Mark and Kay Colvin testified and Christopher Dabrowski and Robert Dejter, inspectors with the County Department of Housing and Community Affairs (DHCA), also testified.

EVIDENCE PRESENTED TO THE BOARD:

1. The subject property is a single family detached dwelling (the dwelling) located at Lot 11, Block 4, Wheaton View Subdivision, 11404 Channing Drive, Silver Spring, Maryland.
2. The dwelling was built in 1966, stands on a lot of 10,007 square feet and is in an R-90 zone.
3. Petitioner has owned and occupied the property since on or about May, 1999.
4. The existing accessory apartment is located in a wing of the dwelling and consists of 492 square feet. The main dwelling consists of approximately 2,600 square feet.
5. The accessory apartment has a separate entrance at the same address at the property and will not require any external modifications to the dwelling.
6. The accessory apartment has a minimum of 4 off-street parking spaces.
7. The Maryland-National Capital Park and Planning Commission (M-NCPPC) reviewed the accessory apartment application and found that: (a) the accessory apartment is consistent with the 1989 Kensington-Wheaton Master Plan; (b) there is adequate street parking at the property to accommodate the accessory apartment; and (c) the property is served by public utilities, including water and sewer (see Exhibit 12).
8. DHCA conducted an inspection of the property on January 2, 2002 and found that the Petitioner must correct the water leak under the kitchen sink, install a single cylinder deadbolt lock on the door, and repair or replace the deteriorated, loose, or leaking components of the gutter and down spout system, and remove any obstructions, as necessary, to provide a system that will properly conduct storm water away from the structure. (see, Exhibit No. 11).
9. Petitioner testified that he would correct the deficiencies noted during the DHCA inspection.
10. There is one other accessory apartment in the Wheaton View subdivision, located at 11506 Channing Drive, Silver Spring.

FINDINGS OF THE BOARD:

GENERAL STANDARDS

The proposed special exception meets the general conditions set forth in Section 59-G-1.21, specifically:

59-G-1.21. General Conditions.

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Accessory apartments are a permissible special exception in the R-90 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

As discussed below, the requested use so complies.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

The accessory apartment is consistent with general plans for physical development of the district, including the 1989 Kensington-Wheaton Master Plan, in accordance with Section 59-G-1.21(a)(3) of the Zoning Ordinance.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

The accessory apartment is in harmony with the general character of the neighborhood. It is located in a wing of an existing home in the neighborhood. No new structures are proposed. Four off-street parking spaces are available. There is only one other accessory apartment special exception in the Wheaton View subdivision.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The accessory apartment is not detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood and will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity.

- (6) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.

The accessory apartment will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature. There is only one other accessory apartment in the Wheaton View subdivision.

- (7) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The accessory apartment will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

- (8) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.

The accessory apartment is served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities

SPECIFIC STANDARDS

The proposed special exception complies with the standards and requirements set forth for the use in division 59-G-2, specifically:

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

The accessory apartment is located on the same lot as the existing one-family detached dwelling, in accordance with Section 59-G-2.00(a)(1) of the Zoning Ordinance.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.

Since the accessory apartment is located in a wing of the dwelling, it has a party wall in common with the main dwelling.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

Not applicable.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

The accessory apartment is in a dwelling which was built in 1966, and is more than 5 years old, in accordance with Section 59-G-2.00(a)(4) of the Zoning Ordinance.

- (5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.

The accessory apartment will not be located on a lot that is occupied by a family of unrelated persons or where a boardinghouse, registered living unit, or guest room for rent exists, in accordance with Section 59-G-2.00(a)(5) of the Zoning Ordinance.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

The location of a separate entrance at the side of the dwelling will preserve the appearance of a single family dwelling.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.

The accessory apartment will have the same street address as the dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling.

As the accessory apartment is 492 square feet and the main dwelling is 2,600 square feet, the accessory apartment is subordinate to the main dwelling.

(b) Ownership requirements:

- (1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.
- (2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this

Petitioner has owned and occupied the property since on or about May, 1999.

- (3) Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.
- (4) For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.

Petitioner will receive compensation for the occupancy of only one dwelling unit.

- (5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Not applicable.

(c) Land use requirements:

- (1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot
- (2) width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

As the lot is 10,007 square feet, the lot size is more than 6,000 square feet, in accordance with Section 59-G-2.00(c)(1) of the Zoning Ordinance.

- (3) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).

As there is only one other accessory apartment in the neighborhood, the accessory apartment will not result in an excessive concentration of similar uses in the general neighborhood.

- (4) There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.

Adequate water supply and sewage disposal systems will serve the occupants of both the accessory apartment and the main dwelling.

- (5) Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or
- (ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

As there are 4 off-street parking spaces, there will be adequate parking at the property, including a minimum of 2 off-street parking spaces.

- (6) Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.

The accessory apartment will not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and will cause no objectionable noise, traffic or other adverse impacts. The apartment has a separate entrance at the side of the dwelling, which preserves the residential appearance of the dwelling. Four off-street parking spaces are available which will minimize impact on neighborhood parking.

The Board grants the special exception for the accessory apartment, subject to the following conditions:

1. The Petitioners are bound by their testimony and exhibits of record, to the extent that such evidence and representations are identified in this opinion, including their representation that they will correct the deficiencies noted in the DHCA report (Exhibit 11).
2. The Petitioners must occupy the dwelling unit in which the accessory apartment is located, except for temporary absences not to exceed 6 months in any 12 month period.
3. The Petitioners may not receive compensation for the occupancy of any other dwelling units.
4. No more than two persons may occupy the accessory apartment.
5. Petitioners shall obtain a license from DHCA prior to renting the accessory apartment.
6. Petitioners will adhere to the plans and statements submitted with this application, including Exhibits 3, 5, 6, and 7.

On a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Donna L. Barron, Allison I. Fultz, and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of February, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and any party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.